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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 517

RICHARD A. McGEE, Director, California Department of Corrections, and ROBERT A. HEINZE, Warden, California State Prison for Men, at Represa, California,
Petitioners,

v.

JAMES NELS EKBERG,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT

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We ask leave to file this supplemental brief in support of our petition for certiorari in an effort to emphasize the growing conflict between divisions of the Ninth Circuit and between one division of the Ninth Circuit and the other circuits.

THE DECISION OF THE COURT OF APPEALS, NINTH CIRCUIT, IS IN CONFLICT WITH OTHER DECISIONS OF THAT COURT AND WITH DECISIONS OF THE OTHER CIRCUITS

If this court should decide that the petitioner has exhausted his remedy in the state court, including

certiorari to the Supreme Court of the United States, then we contend that the action of the district court in denying the petition of appellant was correct and within the rule announced in *Ex parte Hawk,* 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572:

> "Where the state courts have considered and adjudicated the merits of his contentions, and this court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated."

This rule was subsequently followed with approval in the cases of *House* v. *Mayo,* 324 U. S. 42, 48, 65 S. Ct. 517, 89 L. Ed. 739, 743, *White* v. *Ragen,* 324 U. S. 760, 764-765, 65 S. Ct. 987, 89 L. Ed. 1348, 1352, with but one indicated limitation, i.e., where the state court lacks jurisdiction to review the decision. Since *Mooney* v. *Holohan,* 294 U. S. 103, 55 S. Ct. 340, 69 L. Ed. 1036, no one has doubted the power of the California courts to act effectively in situations such as attempted to be presented here.

The Ninth Circuit has long followed the rule announced in *Ex parte Hawk, supra.* In the case of *Bird* v. *Smith,* (9th Cir.) 175 Fed. 2d 260, Chief Judge Denman said:

> "Here are no exceptional circumstances since, as stated, the federal issue before the state supreme court and the United States Supreme Court was determined on the same evidence of claimed

coercion as before the district court was not entitled to consider such a repeated application for the writ."

The Ninth Circuit has followed the rule in the following cases: *Ex parte Adamson,* 167 Fed. 2d 996, *Gordon* v. *Scudder,* 163 Fed. 2d 518, and *Tate* v. *People,* 187 Fed. 2d 98.

It departed from that holding in this case. (191 Fed. 2d 625). In this case, Chief Judge Denman in an opinion joined in by Judge Orr abandoned the position taken by Chief Judge Denman in the *Bird* case (175 Fed. 2d 260). Judge Healy dissented. The court justifies its departure from the rule in the *Hawk* case by relying on 28 U. S. C. Sec. 2254.

The code revisers when they proposed this new section made this note:

> "This new section [28 U. S. C. sec. 2254] is declaratory of existing law as affirmed by the Supreme Court. (See Ex parte Hawk, 1944, 64 S. Ct. 448, 321 U. S. 114, 88 L. Ed. 572.)"
> 80th Congress House Report No. 308.

Either Judge Parker and his revisers didn't know what they were doing or the Ninth Circuit court failed to realize the significance of Sec. 2254 when it rendered its decision in the *Ekberg* case (191 Fed. 2d 625).

We think that we have demonstrated that at the present moment there is a conflict between the panels of judges sitting in the Ninth Circuit and also an

unresolved conflict between Chief Judge Denman in the *Bird* case (175 Fed. 2d 260) and Chief Judge Denman in the *Ekberg* case (191 Fed. 2d 625).

As far as arithmetic is concerned we have two judges of the Ninth Circuit following the *Ekberg* case and five following the *Bird* case.

The rule here contended for is followed in the First, Second, Fourth, Fifth, Seventh and Eighth Circuits as will be discovered from an examination of the following authorities:

Second Circuit:

"But even if state remedies have been exhausted, a federal court will not ordinarily, where a state court has considered and adjudicated the merits of a petitioner's contentions, re-examine upon writ of habeas corpus the questions then adjudicated, provided that the state has accorded remedies which give 'due process of law'." (Citing *Ex Parte Hawk, House* v. *Mayo* and other cases.) *U. S. ex rel. Morrison* v. *Foster,* 175 Fed. 2d 495.

See also: *U. S. ex rel. Carr* v. *Martin* (2 Cir.) 172 Fed. 2d 519, 521; *Schechtman* v. *Foster* (2 Cir.) 172 Fed. 2d 339, 341; *U. S. ex rel. Steele* v. *Jackson* (2 Cir.) 171 Fed. 2d 432, 433; *U. S. ex rel. Monsky* v. *Warden,* 163 Fed. 2d 978.

Fourth Circuit:

"In the Brown case the petition for the writ was denied without hearing, on the basis of its

procedural history. We think that dismissal in both cases was clearly right. In view of the action of the state Supreme Court upon the identical questions presented to the court below and the denial of certiorari by the Supreme Court of the United States, the cases fall squarely within the rule that 'a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated.' "

Speller v. *Allen*, 192 Fed. 2d 477, 478.

See also: *Daniels* v. *Allen*, 192 Fed. 2d 763; *Goodwin* v. *Smyth*, 181 Fed. 2d 498; *Haughey* v. *Smyth*, 170 Fed. 2d 68; *Bernard* v. *Brady*, 164 Fed. 2d 881; *Stonebreaker* v. *Smyth*, 163 Fed. 2d 498.

Fifth Circuit:

" 'Where a state court has considered and adjudicated the merits of a petitioner's contentions, and this court [U. S. Supreme Court] has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated'." (Citing *House* v. *Mayo*.)

Bailey v. *Stoutamire*, 155 Fed. 2d 754.

" 'Where the state courts have considered and adjudicated the merits of his contentions, and [the Supreme Court of the U. S.] has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-

examine upon writ of habeas corpus the question thus adjudicated'." (Citing the *Hawks* case.)

U. S. ex rel. Weber v. *Ragen,* 176 Fed. 2d 579.

See also: *U. S. ex rel. Holderfield* v. *Ragen,* 170 Fed. 2d 189.

Eighth Circuit:

"What did the Supreme Court mean by 'not ordinarily'? We understand the direction of the Supreme Court to be that only in extraordinary cases will a federal court re-examine upon Habeas Corpus questions fully and fairly adjudicated on the merits by the State courts *and passed upon by the Supreme Court.* The rule, as stated, does not of course preclude a re-examination on Habeas Corpus of an extraordinary case by any federal court. And it leaves to those courts the exercise of some discretionary judgment in determining in each such the question of whether that case is one of such a nature that the scrupulous protection of constitutional rights justifies or requires a further hearing. See Wade v. Mayo, 334 U. S. 672, 68 S. Ct. 1270."

Mart v. *Lainson,* 169 Fed. 2d 1016, 1019.

So, in the instant case, as in the case of *Mart* v. *Lainson,* just cited, the district judge exercised his discretion and denied the writ, saying:

"Petitioner has had his allegations considered in the highest tribunals both federal and state.

Hence, I have no further jurisdiction in this matter and the application is denied." (R. 17).

Petitioners respectfully urge that this court grant the petition for certiorari heretofore filed in this matter.

Respectfully submitted,

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